90-678

No. _____

In The

Supreme Court of the United States

October Term, 1990

LESLIE R. BARTH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Second Circuit has violated the due process clause of the Fifth Amendment, as interpreted by *Morrissey v. Brewer*, 408 U.S. 471 (1972), by holding that a written explanation of the reasons for revocation of probation were not required of the United States District Court Judge.

Whether the United States Court of Appeals for the Second Circuit has violated the due process clause of the Fifth Amendment, as interpreted by *Morrissey v. Brewer*, supra, by holding that there was sufficient evidence on the record to warrant revocation of probation.

Whether the United States Court of Appeals for the Second Circuit has violated the due process clause of the Fifth Amendment, as interpreted by *Morrissey v. Brewer*, supra, by holding that Applicant had written notice of the condition of probation that he allegedly violated.

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PETITION FOR A WRIT OF CERTIORARI

Leslie R. Barth, Petitioner, requests that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Second Circuit entered on March 27, 1990, to which said Court denied a petition for rehearing on August 27, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit was filed March 27, 1990. It is reproduced in the Appendix to this Petition beginning at App. p. 1.

A timely petition for rehearing was denied by the United States Court of Appeals for the Second Circuit on July 27, 1990. It is reproduced in the Appendix to this Petition beginning at App. p. 11.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit affirming the District Court's revocation of probation in part and remanding it in part was entered on March 27, 1990. A timely filed petition for rehearing with a suggestion for rehearing in banc was denied on July 27, 1990.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law;. . . . "

2. 18 U.S.C., Rule 32.1, Advisory Committee Notes, 1987 amendment, provide:

"Revocation of probation is proper if the court finds a violation of the conditions of probation and that such violation warrants revocation. Revocation followed by imprisonment is an appropriate disposition if the court finds on the basis of the original offense and the intervening conduct of the probationer that:

(i) confinement is necessary to protect the public from further criminal activity by the offender, or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly deprecate the seriousness of the violation if probation were not revoked."

3. 18 U.S.C. § 3565 provides:

§ 3565.[1] Revocation of probation

(a) Continuation or revocation. – If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable –

(1) continue him on probation, with or without extending the term of[2] modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

(b) Delayed revocation. – The power of the court to revoke a sentence of probation for

violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995.)

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[1] Another section 3565 is set out in another chapter 227 post.

[2] So in original. Probably should be "or".

4. 18 U.S.C. § 3553(a) provides:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

On April 3, 1986, Applicant pled guilty before the Honorable T.F. Gilroy Daly, in the District Court in Bridgeport, CT to one count of failing to file his 1979 income tax return, in violation of Title 26 USC 7203, a misdemeanor. Applicant had made no prior violations of the law, nor had any ever been alleged against him. At such time sentencing was deferred pending Applicants immediate commencement of full time court directed community service, (7 hours per day, 5 days per week)

until September 11, 1986. Applicant successfully completed such service on September 10, 1986, aggregating over 820 hours.

On September 11, 1986, Judge Daly sentenced Applicant to a one year term of imprisonment (the maximum sentence), but suspended execution of that sentence and placed him probation for a period of four years from that date. In addition, a $10,000 fine was imposed and paid, and Applicant was sentenced to an additional 1000 hours of community service, to be served over the term of probation. On the same day, Applicant signed a "Conditions of Probation" form letter, better known as a "Form 7". It contained the standard probation regulations, including the provision that Applicant refrain from leaving the judicial district without permission of the probation officer. Because Applicant's occupation necessitated frequent travel, including foreign travel, after discussion with Applicant's counsel the probation officer gave Applicant "blanket" permission to travel outside the judicial district for business purposes, so long as it did not interfere with his other probation obligations.

From September 11, 1986, to the date of his probation revocation, Applicant complied with all probation conditions, including filing monthly probation reports, appearing at all meetings with his probation officer, furnishing the probation officer with copies of all his tax returns, and performing the mandated community service. During this period Applicant travelled outside of the judicial district on many occasions, including 5 trips outside the United States, aggregating 14 days. On all of the trips outside the United States, Applicant traveled in his own

name, used his own passport, and stayed in well known hotels.

On August 11, 1989, a petition for probation action was filed charging Applicant with leaving the judicial district without proper permission. Appended thereto was an excerpt from a civil deposition given by Applicant in which he indicated that he was in London on a specified date. Such petition was served on Applicant while Applicant was appearing before Judge Daly on another probation action alleging violation of probation for the failure of certain corporations to file income tax returns and in connection with individual income tax returns filed by Applicant prior to being sentenced. At such hearing, the consideration of the alleged probation violation concerned with the income tax returns was deferred and Judge Daly found probable cause that Applicant was a flight risk, and was remanded to the custody of the U.S. Marshall. Applicant was incarcerated on such date. On August 14, 1989, at a bail hearing before the Honorable Warren Eginton, U.S. District Judge, bail was granted after a finding that no risk of flight existed.

On September 28, 1989 a hearing was held on the charge of leaving the judicial district without proper permission. During the course of the hearing, the probation officer admitted that she gave Applicant "blanket" permission to leave the judicial district for business purposes. However, she indicated that she had informed Applicant at a meeting in January 1987 that such "blanket" permission did not apply to trips outside the United States. Applicant testified that he was unaware of any such meeting any such restrictions, except to the extent that such a trip would interfere with his other probation

obligations. He also testified that at no time did the probation officer question him about travel, nor did he discuss the matter with her. At the conclusion of the hearing, Judge Daly indicated that he believed the probation officer in all material respects and concluded that thee was a violation of probation. The hearing was continued until October 19, 1989. Bail was modified by requiring Applicant to report daily, at precisely 10.00 A.M., 5 days per week and to require motions by Applicant's counsel for Applicant to leave the district, including consultation with counsel.

On October 18, 1989, pursuant to Applicant's counsel motion, *Judge Daly dismissed the petition for probation action based on both tax return matters*, and indicated his intention to proceed only with the travel violation issue. At a hearing the following day, after a presentation by Applicant's counsel indicating Applicants compliance with all conditions of probation for three years, save the travel issue, his compliance with the pre-sentencing community service, his compliance with the daily 10:00 A.M. reporting requirement, the ambiguity of the travel condition, it's absence in writing, his prompt return from all trips, his travelling in his own name and on his own passport, his indication of such travel in a civil deposition, Judge Daly imposed the original maximum one year sentence, without any further comment or explanation. A request for bail pending appeal was refused.

On October 19, 1989 a notice of appeal was filed with the United States Court of Appeals for the Second Circuit. On October 31, 1989 the Court of Appeals granted bail pending appeal. On February 27, 1990 Applicants appeal was argued before the Court of Appeals. On March 27,

1990, the Court of Appeals rendered it's opinion, affirming in part and remanding in part. See Appendix A. On April 3, 1990, Applicant filed a request for a rehearing, with a suggestion for a hearing In Banc. Such petition for rehearing was denied. See Appendix B.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit erred by holding that the requirements of a written explanation of the reasons for the revocation of probation, as required by *Morrissey v. Brewer*, 408 U.S. 471 (1972), *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Black v. Romano*, 471 U.S. 606 (1985) were met by transcribed oral findings of the District Court.

Applicant's due process right's under *Morrissey, supra, Gagnon, supra,* and *Black, supra,* were violated in that these cases require that for a revocation of probation, certain requirements must be met by the District Court. These requirements are: (a) a finding of violation of a specified term of probation by a fair preponderance of the evidence, (b) a determination as to whether the violation is sufficiently serious to warrant the revocation of probation, and (3) a written explanation of the reasons for revocation. While the Court did find a violation, it did not meet the other two requirements, as set forth above. The Court of Appeals for the Second Circuit remanded to the District Court for the second requirement, ordering it to make explicit it's determination whether Applicants violation was sufficiently serious to warrant revocation of probation. However, the Court of Appeals held that even

though the third requirement, of a written explanation of the reasons for revocation of probation were not given by the District Court, transcribed oral findings could meet this requirement. In doing so, the Court found this finding to be one of first impression for the Second Circuit, but one in which there is a conflict among other Circuit Courts of Appeal. The Court found that the Eighth Circuit, *U.S. v. Smith*, 767 F.2d 521, 524 (8th Cir. 1985), and the Fifth Circuit, *U.S. v. Lacey*, 648 F.2d 441, 445 (5th Cir. Unit A 1981) hold that statements made in open court and later transcribed, (as in the instant case) were not sufficient to meet the requirements of *Morrissey, supra*, et al. The reason why there must be written reasons for the revocation of probation is so that a reviewing court can determine whether the revocation is substantially valid or "fundamentally unfair." A record is critical to protect the probationer's due process rights and to allow for meaningful review. In *United States v. Martinez*, 650 F.2d 744 (5th Cir. 1981) the Court indicated that the District Court erred in failing to make written statement of reasons for revoking probation; pro forma language and routine phrases will not satisfy due process. In *Kent v. United States*, 383 U.S. 541 (1966) the Supreme Court stressed, a "meaningful review" requires that a court not be relegated to "assumptions." It may not "assume that there are adequate reasons." The Supreme Court stressed in *In re Gault*, 387 U.S. 1 (1967) "Unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."

In its opinion, see Appendix A, the Court of Appeals for the Second Circuit noted that in both of these cases the statements of the District Judge in open court, which

were ultimately transcribed, were not sufficient to allow meaningful review. Applicant contends that the exact situation pertains to the instant case in that no reasons for revocation were given by Judge Daly. (Although the Second Circuit Court of Appeals held that sufficient reasons were given for revocation in open court in the instant case, their order for remand so that Judge Daly could explain if his reasons were serious enough to warrant revocation belies this). The Court of Appeals for the Second Circuit decided, however, to follow the Seventh and Tenth Circuits, which in it's opinion hold that transcribed oral statements can satisfy the written statement requirement of *Morrissey, supra*, et al., citing *U.S. v. Yancy*, 827 F.2d 83, 83-88 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988), and *Morishita v. Morris*, 702 F.2d 207, 209-210 (10th Cir. 1983). Applicant contends that because of the importance of this interpretation of *Morrissey, supra*, et al., and because of this split in authority between Circuit Courts, the instant case should be granted Certiorari, so that the due process requirements of probation revocation can be clarified.

The Second Circuit Court of Appeals erred in holding that there was sufficient evidence on the record to warrant revocation of probation and that in doing so Judge Daly did not abuse his discretion in so holding.

Probation can only be lawfully revoked where there is evidence that demonstrates that the probationer cannot be counted on to avoid anti-social behavior. *Morrissey v. Brewer, supra* at 2599. As Chief Justice Burger so clearly points out in *Morrissey*." In practice, not every violation of parole conditions automatically leads to revocation" and " . . . unless he thinks that (probation should be

revoked) the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity", and "Implicit is the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole," and "Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation".

In the instant case no evidence was ever presented to warrant revocation of probation based on this standard or any other standard. Five short business trips out of the country, in which Applicant travelled in his own name and used his own passport, and promptly returned is legally and rationally insufficient to satisfy the standard for revocation as set forth in *Morrissey*. Here, the probation officer admitted orally modifying Applicant's travel restrictions extensively, and Applicant readily admitted his foreign travel in a civil deposition, something he would not do if he was attempting to conceal there trips. As a consequence, it was an abuse of discretion for Judge Daly to revoke Applicants probation. While a district court has broad discretion to revoke probation when it's conditions are violated, that discretion is limited, and Appellate Courts have authority to review revocation decisions for fundamental unfairness or an abuse of discretion. *United States v. Wilson*, 469 F.2d 368 (2nd Cir. 1972). In fact, all of the evidence presented at the hearing indicates Applicant's successful fulfillment of the terms of probation, i.e. the performance of community service,

filing monthly probation reports, reporting to his probation officer, filing individual income tax returns with his probation officer, and continuing to support his family. Further, Applicants reporting to pre-trial services every single day at 10:00 A.M. for one year must indicate Applicant's compliant attitude toward probation.

The Court of Appeals for the Second Circuit seem to suggest that Applicants failure to surrender his passport sooner than he did may have caused Judge Daly to revoke his probation. Firstly, this was not a condition of probation and therefore under no circumstances can that be urged as a basis for revoking his probation. Secondly, the Applicant explained to his probation officer the problems he was having retrieving his passport, which was out of the judicial district, prior to turning it in to the probation officer. Applicant explained that there was no way for him to leave the judicial district and thusly he had to depend on others to obtain possession of it. Thirdly, the fact that the Court of Appeals had to guess as to the motives of Judge Daly is indicative of the reasons *Morrissey* requires a written explanation of why probation is revoked. Perhaps Judge Bright, of the Eighth Circuit, expressed the law on the subject most pointedly when he said in *U.S. v. Reed*, 573 F.2d 1020 (8th Cir. 1978) "The decision to revoke probation should not merely be a reflexive reaction to a technical violation of the conditions imposed on the offender. That approach would be inconsistent with and detrimental to the goals of a probation program" and "Rather, probation should be revoked only in those instances in which the offender's behavior demonstrates that he or she "cannot be counted on to avoid anti-social behavior" citing *Morrissey, supra*.

It is a principal of federal law that, because probation programs are such a valuable component of the criminal justice system, a decision to revoke that probationary status must not be undertaken lightly. This Court, in *Morrissey, supra,* stressed that parole should only be revoked for the most "serious" violations. This Court has also held, that the revocation of probation should be employed "only as the last resort when treatment has failed or is about to fail." *Gagnon v. Scarpelli, supra.* This critical finding was never made by Judge Daly or the Second Circuit Court of Appeals. That is because no such evidence existed to support such a finding.

Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064 (1983), recognizes that once a decision is made to place a person on probation, the probationer gas a due process right not to be deprived of that liberty without good reason. It is "fundamentally unfair" to promise a person the right of probationary status, and then retract it when he has done nothing that legitimately undermines that form of treatment. In choosing probation, a district judge usually concludes the the public's interests will be met by allowing an individual the freedom to prove that he can rehabilitate himself and live according to the norms required by life in the community. *Bearden, supra,* recognizes that, once this decision is made, both the government and the probationer have an interest in assuring that the probationer is not deprived of this opportunity without good reason. See *Morrissey, supra.* It is simply wrong and unjust for a judge to deprive a person of that vested liberty based on an incident that does not truly cut against the purpose of the original granting of probation.

Finally, Rule 32.1 of the Federal Rules of Criminal Procedure, in the advisory committee Notes, provide:

> "Revocation of probation is proper if the court finds a violation of the conditions of probation and that such violation warrants revocation. Revocation followed by imprisonment is an appropriate disposition if the court finds on the basis of the original offense and the intervening conduct of probationer that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
>
> (iii) it would unduly deprecate the seriousness of the violation if probation were not revoked.

Neither the Second Circuit Court of Appeals or the District Court considered the application of the advisory notes to Rule 32.1, as they clearly preclude revocation of probation and imprisonment in the instant case.[1] Also see USC § 3565 and 3553(a) which provide:

> **§ 3565.[2] Revocation of probation**
>
> **(a) Continuation or revocation.** – If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable –
>
> **(1)** continue him on probation, with or without extending the term of modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

(b) Delayed revocation. – The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995.)

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[1] Another section 3565 is set out in another chapter 227 post.

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§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

The Court of Appeals attempt to justify their finding of sufficient evidence on the record to justify revocation of probation by citing *United States v. Nagelberg*, 413 F.2d 708 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970) and *United States v. Cartwright*, 696 F.2d 344 (5th Cir. 1983) completely ignores the totally different facts and law applicable to these cases. *Nagelberg, supra*, was decided before *Morrissey*, which is determinative in itself. Further, *Nagelberg, supra*, involved a direct denial of a trip to a

probation officer and the commission of an independent illegal act, the failure of probationer to register with the Customs Bureau. *Cartwright, supra,* insofar as relevant at all, was dictum, in that the case was reversed on grounds of inadequate notice to probationer of his alleged violation. However, *Cartwright* involved the violation of probation before it commenced, and the separate illegal act of violating his bond.

Based on *Morrissey supra,* et al and Rule 32.1 of the Federal Rules of Civil Procedure, the Circuit Court of Appeals for the Second Circuit erred in holding that there was a basis on the record justifying revocation of probation of Applicant and holding that Judge Daly did not abuse his discretion by so holding. Therefore Applicant's application for a Writ of Certiorari should be granted to prevent violation of Applicant's due process rights under Article VI of the United States Constitution.

The Second Circuit Court of Appeals erred in holding that Applicant had written notice of the condition of probation that he allegedly violated, thereby violating Applicant's due process rights under the Fifth Amendment to the United States Constitution.

Procedural due process requires that a probationer have either written notice or "record" notice of a condition of probation that forms the basis of a term of imprisonment. *U.S. v. Simmons,* 812 F.2d 561 (9th Cir. 1987) and *U.S. v. Hamilton,* 708 F.2d 1412, 1414 (9th Cir. 1983). Applicant never had written of "record" notice of the specific condition which formed the basis for his

probation revocation. The standard condition of probation which Applicant signed on September 11, 1986 provided:

> "(4) You shall not leave the judicial district without permission of the probation officer"

It is undisputed that Applicant obtained "blanket" permission to leave the judicial district for business purposes, a significant modification of the standard condition of probation he signed. That special condition was never put in writing. The probation officer said that on one occasion she told Applicant that to leave the United States required permission of the Judge. Applicant testified that he never recalled receiving that advice. As the Court said in *U.S. v. Simmons, supra.*

"Generally, formal conditions of probation provide notice of proscribed activities. A court also may impute knowledge when the violation is a criminal act. But when, as here, the proscribed acts are not criminal, due process requires that the probationer receive actual notice", and "The district judge was not required to believe Simmons, but disbelief is not a substitute for affirmative evidence that Simmons was informed that the instant conduct was proscribed by his probation".

An essential component of the due process rights enjoyed by the Petitioner is that an individual be given fair warning of the acts which may lead to revocation of his or her probation, when the proscriber acts are not in and of themselves criminal. Due process requires that a probationer have written notice or "record" notice of the specific condition which forms that basis of a jail term.

The record must be carefully scrutinized to determine whether the probationer did in fact have actual knowledge of the condition. *U.S. v Grant*, 807 F.2d 837 (9th Cir. 1987); *U.S. v. Simmons, supra; U.S. v. Reed, supra; U.S. v. Hamilton, supra; U.S. v. Foster*, 500 F.2d 1241 (9th Cir. 1974); *U.S. v. Chapel*, 428 F.2d 472 (9th Cir. 1974).

Applicant urges that basic due process requires that where a condition is disputed that the very least a probationer is entitled to written notice of that condition before his liberty interest can be taken from him. It is unconscionable to send a person to prison for one year without any written or record" notice of the specific condition he was found to have violated. The law is clear that before a person can be punished for violating a condition of probation, notice of that condition must be clear and unequivocal. *U.S. v. Grant, supra*. The special conditions of probation should not be uncertain, and if such ambiguity does exist, any doubts should be resolved in favor of the probationer. See *U.S. v. Simmons, supra; U.S. v. Reed, supra*. Because Applicant was denied this essential due process right, the Second Circuit Court of Appeals erred in finding that Applicant received written notice of the specific condition of his probation that he violated, and the order revoking his probation should be vacated.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

APPENDIX "A"

COUNTER
COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 823 August Term, 1989

Argued: February 27, 1990 Decided: March 27, 1990

Docket No. 89-1534

---X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

LESLIE R. BARTH,

Defendant-Appellant.

---X

(Filed March 27, 1990)

Before: OAKES, Chief Judge, FEINBERG and WALKER, Circuit Judges.

Appeal from order of the United States District Court for the District of Connecticut revoking appellant's probation and sentencing appellant to one year in jail. District court found that appellant had knowingly and willfully violated a condition of his probation, by traveling outside the United States. Held: transcribed oral findings satisfied the "written statement" requirement of Morrissey v. Brewer, 408 U.S. 471 (1972), and its progeny; there was sufficient evidence in the record to support the revocation of probation; and, appellant received notice of

the specific condition of his probation – i.e., no travel outside the United States – whose violation led to his probation revocation. However, remand is required so that district court can explicitly consider whether appellant's violation was sufficiently serious to warrant revocation of probation.

Affirmed in part, remanded in part.

HERALD PRICE FAHRINGER, New York, NY (Lipsitz, Green, Fahringer, Roll, Schuller & James, Diarmuid White, of Counsel), for Defendant-Appellant.

CALVIN B. KURIMAI, Bridgeport, CT, Assistant United States Attorney for the District of Connecticut (Stanley A. Twardy, Jr., United States Attorney for the District of Connecticut, of Counsel), for Plaintiff-Appellee.

FEINBERG, Circuit Judge:

Defendant Leslie R. Barth appeals from an order of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, J., revoking appellant's probation, and sentencing appellant to one year in jail. Judge Daly found that appellant had knowingly and willfully violated a condition of his probation, by traveling to Europe in April 1989. We affirm in part and remand in part.

Background

In 1986, appellant pled guilty to a one-count information, charging willful failure to file a tax return in violation of 26 U.S.C. § 7203. Judge Daly sentenced appellant to four years of probation and a $10,000 fine; in addition, as special conditions of probation, the judge required appellant to file lawful tax returns, and to perform 1000 hours of community service.

In July 1989, the Probation Department filed a Petition for Probation Action with the district court. The Probation Department alleged that appellant had misstated his income on a number of tax returns. It thus charged appellant with violating Standard Condition One of his probation, which required appellant not to break any laws, as well as one of the two special conditions of probation referred to above.

A hearing was held before Judge Daly in August 1989. By the time of the hearing, the probation officer had learned that appellant had also traveled outside of the United States in apparent violation of Standard Condition Four of his probation, which provided that a probationer "shall not leave the judicial district without permission of the probation officer." At the conclusion of the hearing, the judge found that there was probable cause to hold appellant, and remanded him to the custody of the United States Marshal pending a bail hearing. That hearing was subsequently held before Judge Eginton, who found that there was clear and convincing evidence that appellant would not flee; the judge released appellant on $100,000 bail.

In September 1989, Judge Daly held a further hearing on appellant's probation violation. The focus of the hearing was not appellant's alleged failure to file lawful tax returns, but only the travel abroad.[1] At the close of the hearing, Judge Daly concluded that appellant had violated his parole, finding by a preponderance of the evidence that by traveling to Europe in April 1989 appellant had knowingly and willfully violated Standard Condition Four of his probation. As evidence of willfulness and intent, the judge pointed to additional overseas trips that appellant had made, as well as appellant's prior failure to turn over his passport when ordered to by the judge. The judge also noted appellant's "somewhat cavalier attitude," finding that "in most material respects that [appellant's] evidence is not credible."

In October 1989, Judge Daly held a sentencing hearing. At the conclusion of this hearing, the judge revoked appellant's probation, and sentenced appellant to one year in jail. The judge also denied appellant's motion for bail pending appeal, and this appeal followed. Thereafter, a panel of this court granted bail pending appeal.

Discussion

Appellant attacks the revocation of his probation on three grounds. First, he argues that his due process rights under Morrissey v. Brewer, 408 U.S. 471 (1972), and its progeny, see, e.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973); Black v. Romano, 471 U.S. 606 (1985), were violated because Judge Daly failed to give specific written reasons for revoking his probation, and failed to consider whether appellant's violation was sufficiently serious to

warrant revocation of probation. Second, appellant asserts that there was insufficient evidence in the record to support the revocation of probation, which was based on a single blameless incident. And third, appellant contends that he has been denied due process because he never received written notice of the specific condition of his probation – i.e., no travel outside the United States – whose violation led to his probation revocation.

With regard to the first prong of appellant's due process argument, under *Morrissey* and *Gagnon* due process entitles a probationer, among other things, to "a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation." Black, 471 U.S. at 612 (citing Gagnon, 411 U.S. at 786); see also Morrissey, 408 U.S. at 489. After the revocation and sentencing hearings, Judge Daly announced his findings in open court, which included the evidence he relied upon and the reasons for the revocation of probation, and they were ultimately included in the written transcript. Thus, appellant's claim that his due process rights were violated because Judge Daly failed to give specific written reasons for revoking his probation boils down to the question whether transcribed oral findings can satisfy the "written statement" requirement of *Morrissey* and its progeny.

We can find no opinion of our Court deciding this issue. Appellee urges us to follow the Seventh and Tenth Circuits in holding that transcribed oral findings can indeed satisfy the written statement requirement of *Morrissey*, citing United States v. Yancey, 827 F.2d 83, 88-89 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988), and Morishita v. Morris, 702 F.2d 207, 209-10 (10th Cir. 1983).

Appellant acknowledges, however, that there are two circuit court decisions pointing the other way. See United States v. Smith, 767 F.2d 521, 524 (8th Cir. 1985); United States v. Lacey, 648 F.2d 441, 445 (5th Cir. Unit A 1981). In both, it should be noted that the statements of the district judge in open court, which were ultimately transcribed, were not sufficient to allow meaningful review.

We see no reason why transcribed oral findings cannot satisfy the written statement requirement of *Morrissey*, at least where, as here, we possess a record that is sufficiently complete as to allow the parties and us to determine "the evidence relied on and the reasons for revoking probation." Black, 471 U.S. at 612. "The basis for requiring a written statement of facts is to ensure accurate fact finding and to provide 'an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.' " Yancey, 827 F.2d at 89 (quoting Black, 471 U.S. at 613-14). We agree with the Seventh Circuit that "these goals are satisfied when the oral findings in the transcript enable a reviewing court to determine the basis of the judge's decision to revoke probation." Id.; see also Morishita, 702 F.2d at 210. Of course, we might rule differently were we faced with "general conclusory reasons by the district court for revoking probation," Lacey, 648 F.2d at 445, or with a record from which we were "unable to determine the basis of the district court's decision to revoke probation." Smith, 767 F.2d at 524. But absent such situations, to demand that a district court turn its transcribed oral findings into a written order seems to us unduly formalistic. Cf. Black, 471 U.S. at 611 (previous cases have sought to accommodate, while avoiding the imposition of

rigid requirements, the probationer's interest in retaining liberty and the state's interest in preserving its discretion and assuring the accuracy of probation proceedings).

The second aspect of appellant's due process argument – that Judge Daly failed to consider whether the violation was sufficiently serious to warrant revocation of probation – gives us more pause. "[T]he decision to revoke probation typically involves two distinct components: (1) a retrospective factual question whether the probationer had violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation." Id. at 611. We do not accept appellant's characterization of Judge Daly's revocation of probation as "reflexive." Judge Daly held thorough hearings, and evidently gave the matter careful attention. Nevertheless, it is not clear from the record that the district court considered appellant's argument that his violation was not of a magnitude to warrant revocation. Although this is perhaps implicit in the judge's findings, in light of the importance of this determination under *Black*, see id., we believe that we should remand so that the judge can consider this issue explicitly.

Appellant's second contention is that there was insufficient evidence in the record to support revocation of probation. Appellant attempts to minimize his violation, characterizing it as a "blameless trip overseas." However, the decision to revoke probation will only be overturned if the district court abused its discretion, United States v. Sackinger, 704 F.2d 29, 32 (2d Cir. 1983), and we do not agree that on the record now before us Judge Daly abused his discretion. Appellant overlooks

that he made more than one trip abroad, and that – at least on the record now before us – he apparently resisted revealing the extent of his trips overseas until the district court ordered him back to jail. Furthermore, in a case presenting a rather similar set of facts, we upheld revocation of probation based upon a single incident of travel outside the United States. See United States v. Nagelberg, 413 F.2d 708 (2d Cir. 1969), cert. denied, 396, U.S. 1010 (1970); see also United States v. Cartwright, 696 F.2d 344, 348-49 (5th Cir. 1983).

Appellant attempts to distinguish (*Nagelburg*, arguing that the defendant there concocted an incredible story and lied to his probation officer about the purpose of his trip. However, even though appellant may not have actually lied to his probation officer, Judge Daly could justifiably have felt that appellant tried his best to keep the judge from learning of his travel abroad, and went so far as to resist the judge's direct order to turn over the passport which revealed this travel. In addition, the judge found that "in most material respects that [appellant's] evidence is not credible."

Appellant also argues that *Cartwright* is not on point, because in that case there was a direct instruction from the court not to leave the United States. Judge Daly, however, credited the testimony of appellant's probation officer that she had specifically told appellant that he could not travel outside the United States without prior permission. We do not believe that the distinction between a direct instruction of the district court and that of the probation officer is significant in this context. Thus, there was on this record sufficient evidence to allow the district court to revoke probation. We do not suggest that

such action was required. That is a decision for the district court to make on this or – if it chooses to allow it – on an expanded record after remand.

Appellant's last contention is that he never received written notice of the specific condition of his probation – i.e., no travel outside the United States – whose violation led to his probation revocation. We are not persuaded. Standard Condition Four clearly stated that a probationer "shall not leave the judicial district without permission of the probation officer." And the probation officer testified that she explained this provision to appellant, who signed a form indicating that he understood it. The officer also stated she gave appellant blanket permission to travel for business purposes within the United States but told him that he would need permission "from the Court" to travel outside of the Country.

Nevertheless, we are concerned because the probation officer orally modified the conditions of probation without committing that modification to writing. As the present case demonstrates, such conduct invites litigation over what the actual terms of probation were. Given that the penalty for violating a condition of probation can be a jail sentence, this is an area about which there should be as little uncertainty as possible. The better practice would be to write down the oral modification, thus diminishing the likelihood of later court battles and swearing matches between probationers and probation officers. This need not be an elaborate document; a simple letter outlining the modification would suffice.

Conclusion

We concluded that Judge Daly's transcribed oral findings satisfied the written statement requirement of *Morrissey* and its progeny, that there was sufficient evidence in the record to support the revocation of probation, and that appellant received sufficient written notice of the condition of probation that he violated. However, we believe that the district court should make explicit its determination whether appellant's violation was sufficiently serious to warrant revocation of probation. We thus affirm the order of the district court in part, and remand in part.

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[1] The district court dismissed the allegations of probation violation relating to appellant's tax returns.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ___ 27th ___ day of July ___, one thousand nine hundred and ninety.

UNITED STATES OF AMERICA,

Appellee,

-v-

LESLIE R. BARTH,

Defendant-Appellant.

DOCKET NUMBER: 89-1534

(Filed July 27, 1990)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Leslie R. Barth, Defendant Appellant, Pro Se,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By /s/ Tina Eve Brier
Chief Deputy Clerk

ORDER OF PROBATION REVOCATION

* * *

IT IS HEREBY ORDERED that probation is revoked on the basis of the travel violation and the violation alleged in probation form 12 filed July 24, 1989 is DISMISSED WITHOUT PREJUDICE. (A-184)

No. 90-678

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE R. BARTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a transcript of oral findings satisfies the requirement of a "written statement" in a probation revocation hearing.

2. Whether the evidence was sufficient to support revocation of petitioner's probation.

3. Whether petitioner received adequate notice of the probation condition he violated.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-10, is reported at 899 F.2d 199. The findings of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1990. A petition for rehearing was denied on July 27, 1990. Pet. App. 11-12. The petition for a writ of certiorari was filed on October 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his 1986 conviction for willfully failing to file tax returns, petitioner was sentenced to two four-year terms of probation in the United States District Court for the District of Connecticut. In 1989, the probation office filed a motion to revoke petitioner's probation on the ground that he had violated the conditions of his probation. The district court found that petitioner had intentionally violated one of those conditions and revoked his probation. The court of appeals upheld the district court's finding that the condition had been violated, but remanded for consideration of whether the violation was sufficiently serious to warrant revocation of probation.

1. In 1989, the probation office filed two petitions for probation action with the district court. The first charged that petitioner had misstated his income on a number of tax returns. Pet. App. 3. The second charged that petitioner had taken two trips to England in violation of standard condition four of his probation, which prohibited petitioner from leaving the judicial district without the permission of his probation officer. Gov't C.A. Br. 2; Pet. App. 3.[1]

At a hearing on September 28, 1989, petitioner's probation officer testified that she explained standard condition four to petitioner, who signed a form indicating that he understood it. Pet. App. 9. The probation officer further testified that she gave petitioner permission to travel within the United States for business purposes, but not to travel outside the country. *Ibid.* Notwithstanding standard condition four (as modified by the probation officer), petitioner's passport showed that he had traveled to London on

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[1] The first charge was dismissed without prejudice when petitioner's probation was revoked on the second charge. C.A. App. A163, A184.

April 2 and April 18, 1989, as charged in the probation petition. His passport also showed that he had traveled to London in April 1988, to the Cayman Islands in April and May 1988, and to the Netherlands and London on April 5, 1989. Gov't C.A. Br. 6. Petitioner admitted that he had made the trips indicated on his passport, but he testified that the probation officer had given him permission to travel on business anywhere in the world. Gov't C.A. Br. 7.

The district court found the probation officer's testimony credible, and petitioner's testimony not credible in most material respects. C.A. App. A151. The court found that petitioner's April 1989 trips constituted a knowing and willful violation of standard condition four, and pointed to petitioner's additional international travel and concealment of his passport as evidence of willfulness and intent. Pet. App. 4. Accordingly, the court revoked petitioner's probation and sentenced him to one year in jail. *Ibid.*

2. On appeal, petitioner argued that the procedure followed by the district court in revoking his probation was deficient in three respects. First, petitioner contended that the district court violated the Fifth Amendment's Due Process Clause when it failed to provide specific written reasons for revoking his probation and failed to consider whether violation of the travel condition was serious enough to warrant revocation. Pet. App. 4-5. Second, he argued that the evidence was insufficient to warrant revocation. Third, he claimed that he had no notice that he could not travel outside the United States. *Id.* at 5.

The court of appeals remanded for a determination whether petitioner's violation warranted revocation of his probation, but otherwise rejected petitioner's contentions. Pet. App. 10. First, the court of appeals held that as long as the record is sufficient to permit appellate review, as

it was here, the district court's transcribed oral findings satisfy the requirement of a "written statement by the fact-finder" to which petitioner is entitled under *Gagnon* v. *Scarpelli*, 411 U.S. 778, 786 (1973), and *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972). Pet. App. 6.

Second, the court held that the evidence was sufficient to support revocation of petitioner's probation. The court pointed to the district court's finding that petitioner had made more than one trip abroad and stated that the trial court could reasonably have concluded that petitioner resisted its order to turn over his passport in order to conceal his travel abroad. Pet. App. 7-8. As to petitioner's claim that the district court had not considered whether the violation of the travel condition was serious enough to justify revocation, the court of appeals concluded that it was "perhaps implicit" in the district court's findings that the violation was of sufficient magnitude to warrant revocation of probation, but the court remanded the case to the district court for explicit consideration of that issue. *Id.* at 7, 10.

Third, the court of appeals held that petitioner had received notice of the travel condition that he violated and for which his probation was revoked. The court found that standard condition four clearly prohibited travel outside the judicial district and that the probation officer's oral modification of that restriction permitted business travel only within the United States. Pet. App. 9.[2]

3. On remand, the district court found petitioner's violation sufficiently serious to warrant revocation of probation and imposed a one-year prison sentence. The dis-

[2] Petitioner repeats the claims, made through his testimony, that the probation officer waived standard condition 4 for business travel, Pet. 6, but the court of appeals accepted the district court's finding that "in most material respects * * * [petitioner's] evidence is not credible," Pet. App. 8.

trict court made oral findings to that effect on October 1, 1990, and issued a written order on October 11, 1990.

ARGUMENT

1. Petitioner argues that the district court violated the Due Process Clause by failing to issue a written opinion explaining its decision to revoke his probation. Pet. 9-11.

In *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973), this Court extended to probationers faced with revocation proceedings the same due process rights accorded to parolees by *Morrissey* v. *Brewer*, 408 U.S. 471, 485-489 (1972). Accordingly, before probation may be revoked, a probationer is entitled to, *inter alia*, "a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation." *Black* v. *Romano*, 471 U.S. 606, 612 (1985).

The court of appeals correctly held that the requirement of a "written statement" is satisfied by a transcript of the district court's oral findings. The transcript is itself a "written statement," and nothing would be accomplished by requiring the district court to have the transcribed oral opinion reissued as a written opinion of the court. As petitioner concedes, Pet. 10, the purpose of the written statement requirement is to facilitate appellate review. See *Black* v. *Romano*, 471 U.S. at 613-614. Transcribed oral findings that set forth the factual and legal basis for revoking probation fully satisfy that purpose. For that reason, courts of appeals in two circuits have accepted transcribed oral findings as "written statements." See *United States* v. *Yancey*, 827 F.2d 83, 89 (7th Cir. 1987) (purpose of written statement requirement is satisfied when transcribed oral findings enable reviewing court to determine basis of judge's decision), cert. denied, 485 U.S. 967 (1988); *United States* v. *Rilliet*, 595 F.2d 1138, 1140 (9th Cir. 1979) (no

need for written findings because "[i]t is clear to us why the district judge revoked probation. He orally stated his reasons on the record. We need no more to review this case."); see also *Morishita* v. *Morris*, 702 F.2d 207 (10th Cir. 1983).[3]

Contrary to petitioner's contention, Pet. 10, the decision of the court of appeals in this case and those cited above do not conflict with the decisions of the Fifth Circuit in *United States* v. *Lacey*, 648 F.2d 441 (1981), or the Eighth Circuit in *United States* v. *Smith*, 767 F.2d 521 (1985). In *Lacey*, the Fifth Circuit analyzed the district court's oral statement of reasons and found it inadequate because one of the grounds for revocation on which the district court might have relied was unsupported by the evidence. 648 F.2d at 444-445. Other than quoting from *Morrissey*, 471 U.S. at 489, about the need for a "written statement * * * as to the evidence relied on and reasons for revoking," see *Lacey*, 648 F.2d at 445, the court did not discuss the written statement requirement at all. There is no indication in *Lacey* that the court would have found a full and complete oral statement of findings to be insufficient. *Lacey* is therefore consistent with the decision of the court of appeals in this case. Any doubt on this score is dispelled by *United States* v. *Martinez*, 650 F.2d 744 (1981), in which the Fifth Circuit indicated that transcribed oral findings are not *per se* insufficient in that circuit: "We do not hold nor imply that findings and conclusions as dictated into the record and transcribed by the court reporter do not meet the requirement." *Id.* at 745 n.1.

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[3] This use of transcribed oral findings is consistent with *Black* v. *Romano*. In that case, the Court stated that "[t]he memorandum prepared by the sentencing court *and the transcript of the hearing* provided the necessary written statement explaining the evidence relied upon and the reason for the decision to revoke probation." 471 U.S. at 616 (emphasis added).

In *Smith*, the district court apparently revoked probation without explaining its reasons either orally or in writing. 767 F.2d at 522. The Eighth Circuit reversed in part because it was impossible to determine from the record which of two alleged violations formed the basis of the district court's revocation decision. *Id.* at 524. *Smith* is consistent with the decision below; both recognize that a statement—written or transcribed—must be sufficient to permit appellate review. As the court of appeals explained, "we might rule differently were we faced with 'general conclusory reasons by the district court for revoking probation,' *Lacey*, 648 F.2d at 445, or with a record from which we were 'unable to determine the basis of the district court's decision to revoke probation.' *Smith*, 767 F.2d at 524." Pet. App. 6.

2. Petitioner contends that the evidence was not sufficient to warrant revocation of his probation. Pet. 11-18.

As the court of appeals explained, Pet. App. 7, the decision whether to revoke probation involves two determinations: whether the probationer violated a condition on his probation, and whether that violation warrants revocation. *Black* v. *Romano*, 471 U.S. at 611. The decision under review relates solely to the first determination—whether petitioner violated the travel condition of his probation; the court of appeals remanded with respect to the second, discretionary determination whether petitioner's violation merits revocation of his probation.

The evidence clearly supports the finding by both courts below that petitioner violated the travel condition of his probation. Petitioner's passport documented his trip abroad. One of his written probation conditions was that he could not leave the judicial district without the permission of his probation officer. And the probation officer testified credibly that she had told petitioner he could not leave the country without the permission of the court,

which petitioner never obtained. Petitioner's contrary testimony that he received blanket permission from the probation officer to travel anywhere in the world on business was found not credible by the district court, a finding that was sustained by the court of appeals. The district court further found that petitioner's trips abroad in April 1989 were made in willful and knowing violation of the travel condition. C.A. App. A152.

Intentional violations of a probation condition, such as those committed by petitioner, are sufficient grounds for revocation of probation. "If a probationer is given a short list of reasonable commands he is obligated to follow, willful refusal to abide by these specific conditions may indicate that the probationer is simply incapable of complying with authority. Such a conclusion would justify revocation." *Black* v. *Romano*, 471 U.S. at 623 n.21 (Marshall, J., concurring); see *United States* v. *Morin*, 889 F.2d 328 (1st Cir. 1989) (upholding probation revocation involving violation of travel restriction); *United States* v. *Cartwright*, 696 F.2d 344, 349 (5th Cir. 1983); *United States* v. *Nagelberg*, 413 F.2d 708 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970).

Petitioner's remaining contentions were more appropriately addressed to the district court on remand, and are not presently before this Court. Those contentions include petitioner's assertions that his willful and repeated probation violations did not warrant revocation, Pet. 12, and that his claimed compliance with other conditions of his probation should excuse his willful non-compliance with the travel restriction, *id.* at 12-13.

3. Petitioner contends that he did not receive adequate notice of the travel restriction. Pet. 18-20. Both courts below found, however, that petitioner did receive notice of the travel restriction. He received written notice that standard condition four confined him to the judicial

district unless he obtained the permission of the probation officer, and he signed a form acknowledging that condition. Pet. App. 9. Furthermore, the probation officer testified that she specifically told petitioner that he needed permission from the court to travel abroad. *Id.* at 8. Both the formal condition of probation and the probation officer's statement provided petitioner with "fair warning" that he could not travel abroad without permission. See generally *United States* v. *Simmons*, 812 F.2d 561, 565 (9th Cir. 1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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